Supreme Court, U.S.
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No. 86-439

In The

Supreme Court of the United States

October Term, 1986

IN RE: CENTURY BRASS PRODUCTS, INC.,
Debtor.

CENTURY BRASS PRODUCTS, INC.,
Petitioner,

-against-

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW), et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

UAW BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE ISSUE PRESENTED

DID THE SECOND CIRCUIT ERR IN CONCLUDING THAT THE POTENTIAL OF CONFLICT BETWEEN THE INTERESTS OF THE ACTIVE EMPLOYEES AND RETIRED FORMER EMPLOYEES OF A DEBTOR OPERATING UNDER THE BANKRUPTCY CODE SHOULD BE TAKEN INTO ACCOUNT WHEN DETERMINING WHETHER THE UNION WHICH SERVES AS THE BARGAINING REPRESENTATIVE OF THE DEBTOR'S ACTIVE EMPLOYEES SHOULD ALSO BE REQUIRED TO SERVE AS THE "AUTHORIZED REPRESENTATIVE" OF THE DEBTOR'S RETIRED FORMER EMPLOYEES UNDER SECTION 1113 OF THE BANKRUPTCY CODE?

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The International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), and its Local 1604, by counsel, respectfully pray that the Court **deny** the Petition for Writ of **Certiorari**.

COUNTER-STATEMENT OF THE CASE

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local 1604, ("UAW" or "Union") has been recog-

nized as the collective bargaining representative of the hourly production and maintenance employees of Century Brass Products, Inc. ("Century" or "Debtor") since Century was formed in 1976. (6a) By its terms, the current collective bargaining agreement between Century and the UAW extends until at least August 1, 1987. (37a)

On March 15, 1985 Century filed a petition for reorganization under Chapter 11 of United States Bankruptcy Code, 11 U.S.C. § 1101 et seq. (7a) The following month, Century approached the UAW seeking relief from many of the provisions of the collective bargaining agreement. (8a) Century and the UAW met "numerous times" during April and May of 1985 to discuss possible contractual modifications. (42a-43a) Century's first and second written proposals were delivered to the UAW on or about May 8 and 13, 1985, respectively. (43a-46a)

Throughout the negotiations, Century insisted that the UAW agree to concessions for Century's 600 active employees. Century also insisted that the UAW agree, on behalf of approximately 1,200 retirees receiving vested retirement insurance benefits from Century, that those benefits be either eliminated (for approximately 700 retirees) or significantly reduced (for approximately 500 retirees). (9a-10a) UAW negotiators repeatedly informed Century that the UAW believed that it had no authority to agree in collective bargaining to reduce or eliminate vested retiree benefits, and that consent to any such reduction or elimination had to be obtained from the retirees themselves. (8a-9a) See, *Allied Chemical and Alkali Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 157, 181 n.20 (1971); *UMWA Health and Retirement Funds* v. *Robinson*, 455 U.S. 562, 574-575, n.14 (1982); *Central States Pension Fund* v. *Central Transport*, __ U.S. __, 105 S.Ct. 2833, 2843 and n.18 (1985). In addition, the UAW suggested to Century that it should deal directly with the hourly

retirees, as it was doing with salaried retirees, so as to negotiate and seek their consent to any proposed reduction or elimination of their retirement insurance benefits. (9a) The UAW also suggested the appointment of a representative for retirees in order to facilitate such bargaining. However, Century continued to insist during all of its negotiating sessions with the Union that the UAW bargain over and collectively consent to the reduction and/or elimination of the retirement insurance benefits at issue. (9a-10a)

On May 17, 1985 Century applied to the Bankruptcy Court for rejection of the collective bargaining agreement under Section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113. (10a) The UAW argued, *inter alia*, that the Union had "good cause" to reject Century's proposal, and that Century had not bargained in "good faith", and therefore Century had not met the standards for rejection established in Section 1113. Specifically, the UAW argued that Century improperly insisted that the Union collectively bargain away the vested retirement benefits of retirees no longer employed in the bargaining unit represented by the UAW, rather than seeking the consent of the retirees themselves to such proposals. On July 26, 1985 the Bankruptcy Court granted Century's application and approved rejection.

On appeal to the District Court, the Bankruptcy Court's ruling was upheld. On the UAW's further appeal, however, the Second Circuit reached a different result. In doing so, the Second Circuit accepted the UAW's argument that decisions of this Court such as *Pittsburgh Plate Glass*, *Robinson* and *Central States* require that "[u]nder established contract principles, vested retirement rights may not be altered without the pensioner's consent." 404 U.S. at 181, n.20. But the Second Circuit disagreed with the UAW's claim that in all cases

debtors must negotiate separately with retirees concerning such benefit reductions.

Instead, the Second Circuit concluded that, on the facts of this case — where retirees outnumbered active employees two to one, where the debtor was admittedly troubled and needed to substantially reduce costs, and where under the Union's rules the retirees had no vote on contract ratification — to require the Union to protect both the rights of employees and retirees in negotiations "would cast doubt on the value of bargained-for rights and call into question the adequacy of pre-deprivation representation in the collective bargaining process." (23a) Accordingly, finding the existence of the kind of conflict of interest "acknowledged" by this Court in *Pittsburgh Plate Glass*, *Robinson* and *Central States* (21a), the Second Circuit concluded that the Union was within its rights in refusing to attempt to do in collective bargaining that which it could not do, that is, to "fairly represent two such divergent interests." (23a) The Second Circuit therefore reversed and remanded the case to the Bankruptcy Court, with directions that that Court, under equitable principles applicable in bankruptcy proceedings, appoint a representative for the hourly retirees.

REASONS FOR DENYING THE WRIT

The Second Circuit held in this case that a bankruptcy court must take into account an asserted conflict of interest before deciding whether in a particular case the labor union representing the debtor's active employees will also be required to serve as the "authorized representative" of the debtor's retired former employees in the negotiations governed by Section 1113 of the Bankruptcy Code. The Court below declined to establish a *per se* rule either requiring unions to serve or forbidding

unions from serving as the "authorized representative" of the debtor's retirees in this context. Instead, the Court below concluded that bankruptcy courts should exercise their equitable power under the Bankruptcy Code to determine on the facts of particular cases whether to appoint a separate representative for the retirees.

Because the present case is the first time this issue has arisen — and because the Second Circuit has stated a rule which, within the framework of that Court's analysis and in practice, is both reasonable and workable and which may be easily followed should similar situations arise in the future — review by this Court is unnecessary. See Part I, *infra*. Moreover, the Petition should be denied here because Congress has indicated, in very recent legislation, its intent to review the questions which arise when a debtor operating under the Bankruptcy Code seeks to reduce or eliminate its obligations to its retired former employees. As we demonstrate in Part II, given the likelihood that the issue presented by this case will be acted on by Congress in its next session, review by this Court is unnecessary.

I.

THE SECOND CIRCUIT, IN A CASE OF FIRST IMPRESSION, STATED A RULE WHICH IS REASONABLE AND WORKABLE.

A. The Second Circuit in this case addressed two questions: (1) does Section 1113 of the Bankruptcy Code allow under any circumstances a union to be required to serve as the "authorized representative" for retired former employees of a debtor if the debtor seeks to reduce through Section 1113 negotiations the vested retire-

ment benefits[1] of those retired former employees; and, (2) should the bankruptcy court, in deciding who should be the retirees' representative in particular cases, take into account an asserted conflict of interest which a union may have if required to serve as the "authorized representative" of both a debtor's active employees and its retired former employees. The Second Circuit answered both of those questions in the affirmative.

Disagreeing with the Union here, the Court below held that, as a matter of statutory construction, Section 1113 ordinarily allows a debtor operating under Chapter 11 of the Bankruptcy Code to require that a labor organization collectively bargain for both active employees and retired former employees over a proposal which includes provisions for reductions in the wages and benefits of the debtor's union-represented active employees, as well as provisions for the elimination or reduction of the vested retirement benefits of the retired former employees of the debtor.

Disagreeing with the Debtor here, the Court below found that the Union in this particular case had a conflict of interest — which the Bankruptcy Court below should have taken into account — which prevented the Union from fairly representing in collective bargaining both the Debtor's active employees and its retired former employees. Thus, the Court below "decline[d] to adopt a *per se* rule holding that a union is always the appropriate party to represent the interests of retirees whose former employer is in a Chapter 11 reorganization proceeding." (21a) Instead, the lower court concluded that "[w]hen the suitability of representation on account of a conflict

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[1] The Second Circuit below, along with both the District and Bankruptcy Courts, assumed for the purpose of its decision that the insurance benefits of the retirees which Century sought to reduce were vested benefits of lifetime duration. (8a, n.2)

of interest is raised the bankruptcy court should make a determination as to whether a conflict actually exists." (22a) Applying that rule to the present case, the Court below found that the UAW here — because the ratio of retirees to active employees was approximately two to one, because the Debtor was admittedly troubled and needed to substantially reduce costs, and because the retirees had no vote on contract ratification under the Union's rules — should not be required to "represent two such divergent interests" because it could not fairly do so. (23a).

B. No other court has reached either of the narrow issues presented to the Second Circuit here. There is therefore no conflict of lower court opinion on these questions and no need for this Court to review the Second Circuit's decision.

In addition, the rule stated by the Second Circuit is both reasonable and workable: when a debtor seeks negotiated reductions in benefits payable to its retirees and the union asserts that it cannot fairly serve as the "authorized representative" of the debtor's retired former employees in that regard, the bankruptcy court must examine the situation and determine whether the union representing the active employees of the debtor may also be required to serve as the "authorized representative" for the debtor's retired former employees.[2]

In directing bankruptcy courts to examine potential conflicts of interest before resolving the retiree represen-

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[2] The UAW Respondents, of course, reserve their disagreement and their right to challenge those portions of the Second Circuit's decision which rejected or did not address arguments raised by the UAW below, such as the lower court's conclusion that Section 1113 should be read to require unions to serve as the bargaining representative of retirees when no conflict of interest is found. Because the Second Circuit's determination on these arguments, and its failure to address certain of the UAW's other arguments, were nondeterminative of any part of the Second Circuit's judgment in this case, however, UAW has not cross-petitioned and instead only opposes granting the Writ.

tation issue in particular cases, the Second Circuit correctly applied well-settled doctrines of both labor and bankruptcy law. In *Pittsburgh Plate Glass*, this Court noted that inclusion of retirees in a bargaining unit "would create the potential for severe internal conflicts that would impair the unit's ability to function and would disrupt the process of collective bargaining." 404 U.S. at 173. See also, *Robinson*, 445 U.S. at 574-575, and *Central States*, 105 S.Ct. at 2843 and n.18. As these decisions teach, the recognition of these "potential . . . severe internal conflicts" — and the desirability of avoiding such conflicts — is deeply embedded in labor law.

In addition, bankruptcy law provides ample precedent for the result reached by the Second Circuit. As the lower court noted, bankruptcy courts are familiar with the process of segregating similarly-situated creditors or parties-in-interest into groups and, when necessary, appointing representatives for particular categories of creditors. Indeed, Section 1102 of the Bankruptcy Code, 11 U.S.C. § 1102, explicitly gives bankruptcy courts the discretionary power to appoint official "committees" to represent similarly-situated creditors or parties-in-interest. In calling upon the bankruptcy court to examine asserted conflicts of interest on the part of unions and — if necessary — appoint a separate retiree committee or representative, the Court below was therefore merely requiring that bankruptcy courts exercise their established equitable power "to assure adequate representation of creditors or of equity security holders." Section 1102(a)(2), 11 U.S.C. § 1102(a)(2). See also, 11 U.S.C. § 105(a); 11 U.S.C. § 1109; and *In re Amatex Corp.*, 755 F.2d 1034, 1041-1044 (3rd Cir. 1985) and cases discussed therein.[3]

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[3] Bankruptcy courts have been called upon to exercise such discretion in a variety of contexts ranging from the truly extraordinary

(*concluded on page 9*)

C. Petitioner's principal criticism of the rule stated below is that it will allegedly delay the procedures mandated by Congress in Section 1113. This claim is unpersuasive for several reasons.

Petitioner would deprive bankruptcy courts of their traditional discretion to appoint representatives of parties-in-interest and would instead establish a *per se* rule that unions must always represent both active employees and retirees for collective bargaining purposes in Section 1113 negotiations. The rule stated below, however, provides for an examination of asserted conflicts of interest and confirms the authority of the bankruptcy courts to assure the fair and adequate representation of all parties.

It is undeniable that the interests of active employees and retirees will on occasion conflict, as this Court has repeatedly confirmed in cases such as *Pittsburgh Plate Glass*, *Robinson*, and *Central States*. The Second Circuit's decision merely recognizes that these conflicts may arise in the Chapter 11 context as well. Chapter 11 proceedings entail competition among various creditors — including employees, retired former employees, and other creditors — who all seek to maximize their own share of a limited estate. Conflicts may arise in such situations, and must be taken into account. The Second Circuit's decision merely provides a workable method for dealing with the particular conflict which may arise between active employees and retirees.

(*continued from page 8*)

to the routine. In *In re Amatex Corp.*, *supra*, for example, the Third Circuit called upon the bankruptcy court to exercise its equitable power to appoint a representative for a class of what will certainly be many thousands of presently-unidentifiable future victims of asbestosis who will have claims against an asbestos manufacturer. As a less dramatic example, literally *every* Chapter 11 reorganization requires the bankruptcy court to examine the division of similarly-situated creditors into "classes" for purposes of voting on a proposed plan of reorganization. See, 11 U.S.C. §§ 1122-1129.

In addition, the result reached by the Second Circuit is not likely to have any measurable impact on the speed with which bankruptcy courts resolve applications to reject collective bargaining agreements. As Section 1113 itself demonstrates, the proceedings required prior to a court-approved rejection already call for extensive supervision and scrutiny by a bankruptcy court;[4] provision for one additional determination to be made by the bankruptcy court therefore is unlikely to have appreciable impact on the time required to resolve the issues presented by a rejection application.

Indeed, by admonishing bankruptcy courts to ensure at the onset that the bargaining process envisioned by Section 1113 is workable and fair to all concerned parties, and is not tainted by insurmountable conflicts of interest, the Second Circuit's rule *increases* the chances for successful and productive negotiations under Section 1113, instead of unproductive negotiations of the type which occurred here. By permitting resolution of the retiree representation issue at the outset, the Second Circuit's rule allows the parties to enter negotiations without the difficulties and uncertainties which conflicts of interest — such as found here — would create.[5]

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[4] Caselaw emerging under § 1113, for example, calls for the bankruptcy court to apply a *nine-part* test to applications for rejection. (47a)

[5] Petitioner argues that resolution of the retiree representation issue will delay the beginning of negotiations. The realities of the situation, however, belie this argument. For example, Section 1113 itself requires that the debtor make available for analysis extensive information regarding the financial condition of the debtor. 11 U.S.C. § 1113(b). That process alone typically takes significant time. Under the Second Circuit's rule, debtors seeking expedited negotiations may proceed to comply with those informational requirements while the bankruptcy court considers and decides the retiree representation issue. In addition, the sequence of events in the present case demonstrates that adherence to the Second Circuit's rule would likely have

(*concluded on page 11*)

Finally, Petitioner fails to note that Section 1113 itself makes explicit provision for debtors facing truly emergency situations by allowing such debtors to seek interim relief prior to compliance with the standards for rejection. 11 U.S.C. § 1113(e). The rule stated below creates no bar to the availability of interim relief under Section 1113(e). Petitioner has therefore grossly overstated the impact of the decision below on the availability of relief for debtors seeking to reduce their labor costs.

II.

CONGRESS HAS INDICATED BY RECENT LEGISLATION THAT IT WILL ACT ON ISSUES SUCH AS PRESENTED HERE IN ITS NEXT SESSION.

On July 17, 1986 the LTV Corporation and its affiliates filed for protection under Chapter 11 of the Bankruptcy Code. LTV is the nation's second largest steel manufacturer and is the largest manufacturing concern ever to file for Chapter 11 protection.

The day LTV filed its petition, it unilaterally ceased paying various health and life insurance benefits to its retirees. LTV's action prompted immediate Congressional response. See, e.g., H.R. 5490, 99th Cong., 2d Sess., 132 Cong. Rec. H8551-8555 (daily ed., September 29, 1986); House Judiciary Committee Report 99-917, 99th Cong., 2d Sess. (September 29, 1986). One of the end results of this response was the enactment by Congress on October 17, 1986 of legislation requiring debtors to continue to meet their obligation to provide insurance

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(*continued from page 10*)

no effect on the timing of ultimate resolution of a potential rejection application. A full *two months* transpired between Century's Chapter 11 petition and its application to reject the collective bargaining agreement — ample time to allow the bankruptcy court to resolve the matters discussed in the Second Circuit's decision below.

benefits to their retired former employees until May 15, 1987, notwithstanding any provision of Chapter 11 of the Bankruptcy Code.[6]

In enacting this legislation, Congress indicated that its purpose in doing so was to provide interim protection to retirees in bankruptcy proceedings between now and May, 1987, so that Congress could fully consider and act on the range of questions which arise when debtors, such as the Debtor here, seek relief from retiree obligations in the bankruptcy context, and especially under Section 1113. As Senator Thurmond, Chairman of the Senate Judiciary Committee, and one of the sponsors of the enacted legislation, stated on October 3, 1986, upon introduction of the first version of the legislation eventually passed on October 17, 1986:

> This provision will provide this protection until May 15, 1987, in order to give Congress time to act on the broader question of how retiree bene-

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[6] H.J. Res. 738, Amendment No. 2, Title VI, Section 608, as passed by the House and Senate on October 17, 1986, and signed into law by President Reagan on October 18, 1986, provides:

> Sec. 608(a) Notwithstanding any provision of chapter 11 of title 11, United States Code, the trustee shall pay benefits until May 15, 1987, to retired former employees under a plan, fund or program maintained or established by the debtor prior to filing a petition (through the purchase of insurance or otherwise) for the purpose of providing medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death.
>
> (b) This section is effective with respect to cases commenced under chapter 11, of title 11, United States Code, in which a plan for reorganization has not been confirmed by the court and in which any such benefit is still being paid on October 2, 1986, and in cases that become subject to chapter 11, title 11, United States Code, after October 2, 1986.
>
> (c) This section shall not apply during any period in which a case is subject to chapter 7, title 11, United States Code.

> fits are to be treated under the Bankruptcy Code, and especially under section 1113.[7]

132 Cong. Rec. S.14871-14872 (daily ed., October 3, 1986).

Because Congress has indicated an intent to expeditiously resolve questions with respect to retiree benefits in bankruptcy such as that posed here — and because the Second Circuit's decision poses no conflict with any other decision or authority, and because it also provides a workable solution which may be easily followed pending further legislation — review by this Court is unnecessary.

CONCLUSION

For the foregoing reasons, the Court should **deny** the Petition.

Respectfully submitted,

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[7] On October 3, 1986 Senator Thurmond, along with Senator Metzenbaum and other senators, introduced predecessor amendments very similar to that eventually enacted by the House and Senate in H.J. Res. 738 on October 17, 1986, and signed by the President on October 18, 1986. See, 132 Cong. Rec. S.14871-14873, 15011-15012, 15048-15049 (daily ed., October 3, 1986). The above-quoted comments of Senator Thurmond were made at that time.